Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

DR. JOSEPH C. DEBLASE, AND BEN CERRA,

Petitioners,

v.

CIGNA INDIVIDUAL FINANCIAL SERVICES COMPANY, CIGNA CORPORATION; CIGNA SECURITIES, INC.; NICHOLAS DISETTE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

BERT S. BRAUD
Counsel of Record
The Popham Law Firm
922 Walnut
Suite 1300
Kansas City, MO 64106
(816) 221-2288
Fax (816) 221-3999

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Does the decision of the Eighth Circuit Court of Appeals, in affirming without opinion the decision of the District Court, conflict with and ignore decisions of the controlling state court of last resort (the Missouri Supreme Court), where jurisdiction is based on diversity of citizenship, contrary to this Court's opinions?

2. Does the decision of the Eighth Circuit Court of Appeals, in affirming without opinion the decision of the District Court, improperly condone, contrary to Rule 56 of the Federal Rules of Civil Procedure and this Court's opinions regarding summary judgment, the weighing of evidence in favor of the moving party and against the non-moving party?

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OPINIONS AND ORDERS BELOW

The decision of the Eighth Circuit Court of Appeals, dated November 17, 1994, is an unpublished Per Curiam opinion, and is set out in the Appendix at A-1. The District Court's opinions and the judgments entered, May 27, 1993 (A-4) and March 29, 1994 (A-19), granting the respondents' Motions for Summary Judgment, are unpublished.

JURISDICTION

The Court of Appeals entered its judgment on November 22, 1994. Following the granting of a request for an extension of time, petitioners filed a timely Petition for Rehearing, which was denied on January 19, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Rule 56, Fed. R. Civ. P., provides in pertinent part as follows:

> (c) Motion and Proceedings thereon. [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

> fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

Petitioners filed their claims in state court (June 1991), alleging three (3) theories of recovery in five separate counts: Fraud (Count I for common law fraud, and Count V for violations of the Missouri Merchandising Practices Act, RSMo. § 407.020 *et seq.*); Breach of Fiduciary Duty (Count II); and Negligence (Count III for the negligence of the individual Respondent and Count IV for the negligence of the corporate respondents). Respondents removed the matter to Federal District Court based upon diversity jurisdiction.

Respondents filed a motion for summary judgment on the fraud-based counts. On May 25, 1993, within days of a June 7 trial, the District Court granted respondents' motion for summary judgment. Because respondents filed the original motion *only as to the fraud counts*, petitioners sought (by telephone request) clarification of the extent of the District Court's order. On May 27, 1993, the District Court issued an amended order granting summary judgment as to <u>all</u> counts. (App. A-4).

Petitioners filed a motion asking the District Court to reconsider its order, since respondents' motion had only addressed the fraud-based counts and not the negligence counts. On November 17, 1993, the District Court issued its

Second Amended Order, repeating its earlier position granting summary judgment as to the fraud-based counts, but granting petitioners' motion to reconsider and reinstating the negligence counts and the fiduciary duty count.

On December 30, 1993, respondents filed yet another motion for summary judgment, this time focusing on the negligence counts and the fiduciary duty count. The District Court granted that motion on March 29, 1994 (App. A-19).

On May 10, 1994, petitioners filed their Notice of Appeal to the Eighth Circuit Court of Appeals. Because the Missouri Supreme Court has accepted transfer of a case factually similar, and addressing the same critical legal issues as this case, petitioners asked the Eighth Circuit to withhold any ruling until the Missouri Supreme Court had issued its opinion. On November 22, 1994, the Eighth Circuit denied petitioners' motion to consider the Missouri Supreme Court's pending opinion. On that same day, in a Per Curiam Order, the Eighth Circuit affirmed the District Court, without addressing any of the issues raised by the petitioners. On January 19, 1995, the Eighth Circuit denied petitioners' request for rehearing.

1. Statement of the Facts

Petitioners invested substantial funds on the advice of respondent Nicholas DiSette (DiSette). Petitioners' evidence was that DiSette lied to the petitioners regarding the nature of the investments he was recommending, and lied to

petitioners concerning whether they needed to read the accompanying offering materials, which revealed the true nature of the investments. There was a factual dispute about whether one of the petitioners, Ben Cerra ("Cerra"), actually received the offering materials.

Neither petitioner was sophisticated in investing his money. DiSette himself admitted that Cerra was not a sophisticated investor. (DiSette depo., p. 180). Cerra testified: "I didn't understand the whole financial end of money, any kind of money, and I didn't know what I should or not be doing [with his income]." (Cerra depo., p. 18).

In short, when DiSette told Cerra that Cerra could build houses but not do financial planning, DiSette was "very right." (*Id.* at p. 50). Before meeting DiSette, the highest income Cerra had ever earned in one year was $40,000.00. (*Id.* at p. 11). Mr. Cerra's entire prior investment history consisted of a few certificates of deposit and two IRA's. (*Id.* at p. 16).

Dr. Joseph DeBlase ("DeBlase") was a successful doctor. He was also an "experienced investor." However, he was anything but a successful investor. DeBlase

> . . . was so busy with medicine that I didn't pay any attention to my financial business. I didn't know about planning, I lost money, it seemed like most of the investments I made weren't good, and I needed someone to do this

> for me. Because I didn't understand why, you know, something looked good to me and it didn't turn out to be good.

(DeBlase depo., p. 47). DiSette said that DeBlase needed help badly. (*Id.* at p. 47).

In the early 1980s, DeBlase became acquainted with DiSette, an investment advisor who worked with Respondent/ Appellee CIGNA Individual Financial Services ("CIGNA"). (Depo. of DeBlase, p. 33-34). DiSette convinced DeBlase that DeBlase should pay DiSette Twelve Thousand Dollars ($12,000.00) per year for DiSette's advice. DiSette became the paid financial advisor of DeBlase. (Answer of Defendants to Amended Complaint, ¶ 7, p. 2).

While Cerra had a good year in 1986, he knew from experience that good years come and go. Cerra believed that within three years, business would probably fall off. (Cerra depo., p. 15-16). As a result, Cerra was interested in preserving the income from that good year to have at his disposal when the housing market changed. (*Id.*, p. 34) DeBlase suggested to Cerra that Cerra meet with DiSette; DiSette charged Cerra Six Thousand Dollars ($6,000.00) per year to be Cerra's paid financial advisor. (Answer of Defendants to Amended Complaint, ¶ 12, p. 4).

DeBlase and Cerra had similar investment objectives. DeBlase's objectives were a dependable income for his wife, an emergency fund for illness, a guaranteed income in case

of disability, and retirement income. (DeBlase depo. at p. 61). He "wanted things that [he] could derive an income from, so that when [he] retire[d] [he] would have a good income and [his] quality of life would not change." (*Id.* at 58). Cerra "was looking for somebody who could help [him] to put [his] money away to where [he] would not hit the downfalls as they're in [his] business financially." (Cerra depo., p. 15). He wanted "safe investments that were liquid enough that [he] could obtain in a no more than a four-year time frame." (*Id.* at 34; *see also* pp. 40 through 41). In spite of that, DiSette recommended that both invest primarily in high risk, highly leveraged real estate limited partnerships.

CIGNA had procedures in place concerning the recommendation of investments, and the review of advisors like DiSette. (*See* depo. of Robert Clark, at pp. 43-44). Mr. Clark is vice-president of CIGNA Securities. (Clark depo., p. 29) James Lasater, Manager/Regional Vice-President, Kansas City, admitted that it was his responsibility as DiSette's supervisor to review DiSette's activities, and review the investment objectives of the client. (Lasater depo. at pp. 95-96). Clark testified that it would not be appropriate to instruct a client not to read the subscription documents before signing. (*Id.*, at pp. 90-92). He also said it is unusual for the producer/agent to maintain the Private Placement Memoranda (PPMs) in his office, rather than deliver them to the client. (*Id.* at 92). The producer of an investment, like DiSette, should discuss the risks of an investment with the client. (*Id.* at 72). Lasater said, "I cannot imagine somebody not delivering a prospectus." That, according to Lasater, would be inappro-

priate. (*Id.*, at p. 77). Lasater also acknowledged that it would be improper to recommend the purchase of an investment that would be inconsistent with the objectives of the investor. (*Id.* at 83).

The limited partnerships had lengthy offering materials, which showed the risks and the nature of the investments. DiSette discouraged DeBlase and Cerra from reading these materials, in spite of CIGNA's rules to the contrary, as identified by Lasater. DiSette told DeBlase, "You don't need to read these documents. This is what you are paying me to do." (DeBlase depo., p. 97 and p. 109). DiSette presented DeBlase and Cerra with a large stack of documents, and said, "Sign on the line indicated." (*Id.*, p. 103). The signature lines would be "flagged" with yellow post-it notes, and DiSette would flip through the pages while the client signed. (DiSette depo., p. 169). Sometimes, DiSette would bring only the signature pages for his clients' review. (DeBlase depo., p. 103). In Cerra's case, ***DiSette did not provide him with the actual offering materials***, but with the signature pages only. (Cerra depo., pp. 81, and 121).

The language on the signature pages included statements that the investors had read the materials that accompanied the pages – DiSette, of course, knew that this was not true. Some investments required an investment advisor, since DeBlase and Cerra were not considered accredited investors. On those occasions, DiSette enlisted the help of two professionals – one, an attorney and the other an accountant – to lend their names to the materials, to give the

impression that the "advisors" had actually offered advice. In fact, Cerra never even met the "advisors", and did not know they had lent their names to the investments. Predictably, given the high-risk nature of the investments, the investments failed miserably, with petitioners losing more than One Million Dollars ($1,000,000.00).

1. This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with decisions of the court of last resort in this jurisdiction for claims based on state common law, namely, the Missouri Supreme Court. Further, the decision of the Eighth Circuit is inconsistent with it's own opinion in *Jacobs Manufacturing Company v. Sam Brown Company*, 19 F.3d 1259 (8th Cir. 1994).

The sole basis for the ruling of the District Court, and presumably, the Eighth Circuit, are the written descriptions of the investments contained in the offering materials. Those writings, assuming petitioners ever saw them[1], differed drastically from the verbal representations – the lies – of DiSette.

The first threshold is the assumption that the petitioners received the PPMs to begin with. Cerra testified that he never received them. DiSette kept the PPMs in his office. The only documents Cerra ever saw were the signa-

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[1]Indeed, the trial would have had to engage in fact finding to conclude that the petitioners received the materials, since there existed a factual dispute on that issue.

ture pages DiSette flashed in Cerra's face when they needed to be signed; the forms were blank when Cerra signed them. DeBlase testified that he did not see the materials on all the investments, and was told the same as Cerra – DiSette "would turn to this and say 'sign here,' and I would sign, and he would turn to the next tab, 'sign here,' and I would sign." DeBlase depo., p. 103. DiSette himself confirmed that he would deliver the subscription documents with post-it notes for signatures. DiSette depo., p. 169. Always, DiSette would repeatedly tell Cerra and DeBlase that they did not need to read the PPMs; that was DiSette's job.

The Missouri Court of Appeals has recently given a strong indication of what the Missouri Courts think of the kind of behavior exhibited here by DiSette. In *Cochran v. Giddens*, 1994 WL 160351 (Mo. App. E.D. May 3, 1994), petitioners told their financial planner that their goals and objectives were as follows:

> 1. Preservation of capital is the primary concern. It is more important to receive a return of capital than a return on capital.
>
> 2. Diversification is the key to successful investing . . . .
>
> 3. There should exist adequate income upon retirement to maintain their current life style.

4. When possible, tax advantages should be used to reduce current taxable income.

Id., p. 1. These are identical to the objectives of DeBlase and Cerra. The issue in *Cochran* was whether the plaintiffs were on notice of the fraud, thus triggering the statute of limitations. Respondents argued that, *by virtue of the written material setting out the risks*, plaintiffs were on notice. In that case, plaintiffs received several lengthy, single-spaced prospectuses; here, there is a factual dispute about whether both petitioners actually received those materials.

The defendant in *Cochran* verbally assured the plaintiffs that the investments were not risky. The plaintiffs said that they "'trusted [Planner] completely throughout our dealings with him. He was the expert. We told him we had no experience or education concerning these types of investments and that we were trusting him to protect our interests.'" *Id.* at p. 3.[2]

The *Cochran* decision is consistent with Missouri law, which entitles a person to rely on the representations of another, *even if the hearer has access to the same information as the person making the misrepresentation*:

> Where a distinct and specific representation is made to be acted upon, however, and action is induced, the representee has the right to rely on the representation *even if the parties stand upon an equal footing or have equal knowl-*

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[2] Compare that to statements of DeBlase and Cerra. Cerra did what DiSette told him, because he had all the confidence in the world in DiSette. (Cerra Depo., p. 75). "There was a time he was going to be the executor of my will. I trusted anything he said." (DeBlase depo., p. 117).

> *edge or means of information as to the subject matter, or even if the representation is one not calculated to impress a person of ordinary prudence.*

Essex v. Getty Oil Company, 661 S.W.2d 544, 550 (Mo. App. 1983), emphasis added, citing *Cantley v. Plattner*, 228 Mo. App. 441, 67 S.W. 2d 125 (1934), cited in *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 637 (Mo. App. 1980). In other words, even if the investors had equal access to the offering materials, where the investment advisor makes a distinct and specific representation as to the nature of the investment, the investor has the right to rely on that representation.

Because of that, the Missouri Court of Appeals decided that the written materials did not put the investors on notice of any damages that would trigger the statute of limitations for fraud, and the Court of Appeals would reverse and remand. The Court transferred the case to the Missouri Supreme Court, because of the importance of the issues to be decided. Clearly, the Missouri courts believe that an investor can rely on what his advisor tells him, even if it is contrary to written statements.

In the District Court opinion here, the Court acknowledged that DiSette instructed the petitioners not to read the PPMs. (App. A-10). In spite of those instructions, the District Court placed the burden on the petitioners to investigate the veracity of what their paid financial planner told them.

Counsel for the petitioners here, upon information and belief, represents to this Court that besides the notice issue, other issues germane to this case, such as the nature of the fiduciary relationship of an investment advisor to the

investors, are before the Missouri Supreme Court in the *Cochran* appeal. That case was argued before the Missouri Supreme Court in early November 1994, and is ripe for a decision. Petitioners here moved the Eighth Circuit for a delay in any ruling, pending the very important ruling of the Missouri Supreme Court, but that motion was denied without any reasons given. The *Cochran* opinion is an "all-fours", dispositive case – wouldn't it be prudent, in this state court, diversity case, to at least wait and see what the Missouri Supreme Court is going to do, especially when the Missouri Court of Appeals decided the issues favorably to the petitioners here and contrary to the Per Curiam Order? This circumstance makes this case an exceptional candidate for this Court to grant, vacate and remand the case to the District Court, pending the imminent decision of the Missouri Supreme Court. Likewise, the case is a candidate for holding until the Missouri Supreme Court has issued its opinion in *Cochran*.

In *Jacobs Manufacturing Company v. Sam Brown Company*, 19 F.3d 1259 (8th Cir. 1994), the Eighth Circuit addressed the significance of written representations *vis a vis* oral statements. Brown was a distributor of Jacobs, and signed annual distributorship agreements that had a one-year term. However, Jacobs verbally represented to Brown that the relationship would last "a lifetime." Brown relied on the oral representations, although they were *contrary to the written agreement*; the District Court vacated a jury verdict in favor of Brown, on the same premise used here:

> . . . Brown's reliance on the verbal representations was not justified as a matter of law, because the verbal representations conflicted with the express terms of the written distributorship agreements. This view is *unsupported by Missouri law*, however."

Id. at 1264 (emphasis added). The Eighth Circuit explained:

> In a Missouri fraud case, it is ***for a jury to decide whether a party may rely on verbal representations that conflict with a written agreement***. *Pinken v. Frank*, 704 F.2d 1019, 1024-26 (8th Cir. 1983); *Essex [v. Getty Oil Company]*, 661 S.W.2d 544, 550. Thus, Brown's reliance on Jacobs's [sic] verbal representations could be justified, even though the verbal representations contradicted the distributorship agreements' one-year terms and reservation to Jacobs of the right to sell directly to the original equipment manufacturers.

Id., (emphasis added). The Court concluded, "It was for the jury to decide whether Brown's reliance on Jacobs' verbal representations was justified." *Id.*, (emphasis added).

As here, the District Court in *Jacobs* made several subsequent rulings based on that one premise; that is, that a party cannot rely on oral representations that are contrary to written language. The Eighth Circuit reversed the District Court's subsequent rulings based on that premise. Indeed, the Eighth Circuit held that the District Court's rulings were

> . . . infected by the District Court's *legally incorrect view* that Brown could not justifiably believe Jacobs' verbal representations over the written agreements' terms, *see* 792 F. Supp. at 1537, as we have already pointed out.

Jacobs, at 1267 (emphasis added). The Eighth Circuit concluded that the District Court had a "misconception of Missouri law."

This is a Missouri common law case, with absolute deference given to Missouri state law. This is not a federal securities action, but a Missouri common law fraud and breach of fiduciary duty action. Missouri courts do not allow investment advisors to lie to their clients, and specifically, the Missouri Supreme Court is addressing this very issue.

2. **This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with Missouri common law, and the Supreme Court of the United States' opinion in *Salve Regina College v. Russell*, 111 S. Ct. 1117, 1125 (1991).**

In this diversity case, this Court must review the District Court's determinations of state law de novo, giving the determinations no deference. *Salve Regina College v. Russell*, 111 S. Ct. 1117, 1125 (1991). De novo review means that the court should review the case anew, giving appropriate consideration to state law. In a case involving the loss of over one million dollars at the hands of an unscrupulous fiduciary advisor, a de novo review should result, in the minimum, in a well-reasoned opinion explaining why the courts sanction fraud and lying.

Had the Eighth Circuit given proper deference to the opinions of the Supreme Court of the State of Missouri, the Eighth Circuit would not have allowed the injustice of the District Court to stand. The District Court's conclusions are clearly contrary to the common law in Missouri, and should be reversed.

3. **This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with Missouri common law, and specifically, *Vogel v. A.G. Edwards*, 801 S.W.2d 746 (Mo. App. 1990),**

holding that an investment advisor has a fiduciary relationship with his clients.

The law in Missouri is that an investment advisor is, as a matter of law, a fiduciary in relation to his clients. "Missouri courts have uniformly held or stated that a stock broker owes a fiduciary duty to his customer." *Vogel v. A.G. Edwards*, 801 S.W.2d 746, 751 (Mo. App. 1990), citing *Leuzinger v. Merrill, Lynch, Fenner and Smith, Inc.*, 396 S.W.2d 570, 575 (Mo. banc 1965), and *Mercantile Trust Company v. Harper*, 622 S.W.2d 345, 349 (Mo. App. 1981). As the *Mercantile Trust* court stated:

> . . . the relationship between a stockbroker and his customer is that of agent and principal. Owing a fiduciary duty to the customer, the broker has an *'obligation to keep the customer fully informed of all facts pertinent to transactions in which the broker is representing the principal, to make full disclosure of all facts which materially affect the subject matter of the agency, and to exercise reasonable care and diligence in the performance of his duties.'*

Mercantile Trust, 622 S.W.2d at 349 (emphasis added).

While the *Vogel* case dealt with a discretionary account, it did note that the broker's duties in a non-discretionary account such as petitioners':

> . . . are, nonetheless, fiduciary duties. The broker must study a stock before recommending it and inform the customer of the risks involved in the particular transaction. Beyond that, the duties are to refrain from self dealing and misrepresentation, follow the

> customer's order and disclose any personal interest in the transaction.

Vogel, 801 S.W.2d at 752, citing ***Leib v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.***, 461 F. Supp. 951 (E.D. Mich. 1978). The *Vogel* opinion also pointed out that, while it was a state court case, federal courts followed the same principle:

> This is the understanding of Missouri law by our colleagues in the federal courts:
>
> Missouri law clearly imposes general obligations and duties upon stock brokers. The general rule is that the relationship of the broker to its customer is fiduciary and confidential.

Vogel, 801 S.W.2d at 752, citing *Smith v. Smith, Barney, Harris and Upham & Co., Inc.*, 505 F. Supp. 1380, 1387 (W.D. Mo. 1981).

As such, DiSette owed certain duties to DeBlase and Cerra. Among those duties, DiSette owed petitioners an obligation to inform them of the risks of the particular investments. There is a sharp dispute in the facts about whether DiSette informed petitioners of the risks associated with the investment of over a million dollars – petitioners testified that DiSette told them that the investments were safe. The only way the District Court could conclude that the DiSette properly informed petitioners would be for the District Court to improperly weigh evidence in favor of the respondents.

As the procedural history of this case shows, the District Court initially granted summary judgment as to all counts, then reconsidered that position as to the negligence

and fiduciary duty counts, because the defendants had not set out sufficient facts to support summary judgment on those counts. Yet, the *only facts defendants recited* in support of summary judgment on the negligence and fiduciary duty counts *were the findings of fact by the court in its first order.* In other words, the court had earlier ruled that there were not sufficient facts for summary judgment, but later, based on *its own findings of fact*, the court granted summary judgment.

Such weighing of evidence is contrary to the law of this Court, as set out in several recent decisions. "In ruling on a motion for summary judgment, '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Reves v. Ernst & Young*, ___ U.S. ___ 113 S.Ct. 1163, 122 L. Ed.2d 525 (1993), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). On a motion for summary judgment, the moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987).

The Court, therefore, must believe petitioners' evidence – DiSette lied to the petitioners and did not give them the PPMs. For the District Court to conclude otherwise is the result of improper inferences drawn in favor of the respondents.

4. This Court should issue a writ of certiorari because the Eighth Circuit's ruling is inconsistent with *Umpleby by and through Umpleby v. United States*, 806 F.2d 812 (8th Cir. 1986).

Besides the fraud and fiduciary duty counts, petitioners pleaded counts of common law negligence. Petitioners alleged that DiSette was negligent in recommending the investments to begin with, considering the

investment objectives stated by the petitioners. Further, petitioners alleged that CIGNA was negligent in failing to properly supervise DiSette in his recommendations to the petitioners. The District Court, relying on the erroneous conclusion that DiSette owed no duty to petitioners, granted summary judgment. Ironically, the District Court had earlier conceded, in its Order of May 27, 1993, that ". . . DiSette's alleged assurances to plaintiffs may have been poor counsel . . . ." (A-12, n. 10, emphasis added). Isn't poor counsel negligence?

Almost by definition, summary judgment in a negligence case requires finding facts for one of the parties. The Eighth Circuit's decisions support that proposition. In *Umpleby by and through Umpleby v. United States*, 806 F.2d 812 (8th Cir. 1986), a Federal Tort Claims Act case, the Court wisely observed that:

> Since tort actions generally encompass a multitude of factual issues and abstract situations, such actions are usually not appropriate for disposition by summary judgment.

Id. at 815. As the Fifth Circuit put it:

> Summary judgment will not usually be as feasible in negligence cases, where the standard of the reasonable man must be applied to conflicting testimony, as it is in other kinds of litigation. [citations omitted.] Even when the facts underlying the issue of negligence are undisputed, the issue must still be submitted to the jury if reasonable men could reach different conclusions and inferences from those facts. [citation omitted.] Of course, it would be a mistake to conclude that

> summary judgment is never appropriate in a negligence action, *but the circumstances in which it is proper are rare.*

Croley V. Matson Navigation Company, 434 F.2d 73, 75 (5th Cir. 1970) (emphasis added).

The commentators share that view. "[A]lthough a motion for summary judgment under Rule 56 may be made in any civil action, it is not commonly interposed, and even less frequently granted, in negligence actions." Wright, Miller & Kane, *Federal Practice and Procedure*, Vol. 10A, § 2729.

> It is not surprising that summary judgment is seldom sought or granted in negligence actions. Judge and jury each have a specialized function in negligence actions and particular deference has been accorded the jury in this class of cases in light of its supposedly unique competence in applying the reasonable man standard to a given fact situation.

Id. It is even more difficult for a defendant to prevail on a summary judgment motion when it is based on the assertion that there is no factual dispute regarding an issue of negligence or contributory negligence, since those questions are thought of as being within the special competence of the jury. *Id.*, 1993 supplement, emphasis added.

Recall that the *Vogel* case imposes on brokers a duty to investigate investments before recommending them. One of three things took place here. The first possible scenario is that DiSette investigated the investments as required, but did so negligently, and failed to discern the risk involved; in that case, he negligently recommended the investment. The

second alternative - he failed to perform any investigation at all, and therefore breached his duties under *Vogel*. The third alternative is that he competently investigated the investments, found them to be high risk, but nevertheless recommended them to his clients. Respondents' own expert testified that this would be negligent. "If their primary investment objective was to preserve capital and not put any of their dollars at risk, then these types of investments would not be suitable." (Deposition of Joan Lavell, p. 42).

To reach its conclusions, the District Court had to engage in fact finding to the extreme degree. The District Court acknowledged in an Order dated March 29, 1994 that DiSette had a duty to inform his clients of the risks in the investments, citing *Vogel*, at A-23. To grant summary judgment on negligence, the Court has to conclude that *petitioners* were *both 100% negligent*, and that the *respondents* were *not negligent at all*. This Court must ask whether a reasonable person could find that DiSette was even one percent negligent in making the investment recommendations he made or whether CIGNA was one percent negligent in its supervision of DiSette.

The District Court completely ignored petitioners' claims of negligence against CIGNA, reasoning that if DiSette could not be negligent, neither could CIGNA. Petitioners' claims against CIGNA are separate and distinct, and stand alone – CIGNA owes duties to the petitioners that are unique to CIGNA.

CIGNA's representatives testified that it would be inappropriate to instruct a client not to read the PPMs before signing subscription documents. Further, it is unusual for the agent to maintain the PPMs in his office and not deliver them to the client. According to DiSette's supervisor, DiSette should have discussed the risks of the investment with the

client. Finally, DiSette's supervisor, James Lasater, acknowledged that it is the obligation of the supervisor, Lasater, to see that these things are done properly. It is quite possible that a jury could find CIGNA negligent without finding DiSette negligent.

These facts are enough to have submitted this case to a jury for determination.

The facts presented to the court by the petitioners, which the court must take as true, are that DiSette knew the investment objectives of the petitioners – other words, DiSette knew that petitioners both wanted safe, income producing investments. As the plaintiffs in *Cochran*, *infra.*, put it, they would rather have a return *of* capital than a return *on* capital. With those objectives in mind, DiSette nevertheless put the petitioners in high risk investments.

5. This Court should issue a writ of certiorari because the absence of an opinion here will lead to confusion, especially when the apparent outcome is a sanctioning of fraudulent behavior by investment advisors.

A very disappointing aspect of the Per Curiam order is that it fails to explain any rationale for the ruling. Although it purports to adopt the reasoning of the District Court, this only leads to confusion because of the District Court's ruling.

The opinion of the District Court appears to sanction misrepresentations and fraud – *lying* – by investment advisors. In a nutshell, the ruling concludes that as long as written materials are given to an investor, even though

incomplete[3], an investment advisor may lie to the investor and misrepresent the nature of the investment. Remember, petitioners' evidence was that DiSette told them the investments were safe, low-risk investments – this must be believed on a motion for summary judgment. Accepting petitioners' evidence as true, the only conclusion can be that it doesn't matter if an investment advisor lies to his client.

CONCLUSION

In this Missouri common law case, the parties are entitled to the application (and an analysis of that application) of Missouri law. It is an injustice of the worst kind to ignore a pending Missouri Supreme Court decision, which would be dispositive of the issues here. If this Court refuses to rehear the appeal, and the Missouri Supreme Court comes down in favor of the plaintiffs, it will be too late for these petitioners to enjoy the law of the state of Missouri as enunciated in that Opinion.

Respectfully submitted,

Bert S. Braud
The Popham Law Firm, P.C.
1300 Commerce Trust Bldg.
922 Walnut
Kansas City, Missouri 64106
(816) 221-2288

Attorneys for Petitioners

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[3] The evidence was that the only written materials conclusively given to the appellants was a signature page that suggested they had read other, more detailed, materials. The undisputed evidence of Ben Cerra was that he had not received those more detailed materials; Joe Debase could not remember whether he got them or not. Even if he had, DiSette told Debase not to read them.